

### **REMARKS**

Claims 144-150 are presently pending in the application. No claims have been amended for purposes of clarification or for purposes of overcoming the prior art.

Claims 144-150 were rejected under 35 U.S.C. § 102(e), as being anticipated by U.S. Patent 6,405,072 issued to Cosman ("Cosman"). Cosman does not support a Section 102 rejection of claims 144-150 because Cosman does not anticipate each and every element of the claimed invention.

Additionally, Claims 144-150 were provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 98-107 of copending Application No. 10/722,015 and over claims 119-130 over copending Application No. 10/721,491. In response to this provisional rejection, applicant hereby submits the attached terminal disclaimer.

The applicants wish to thank the Examiner and Supervisory Patent Examiner Eleni Mantis-Mercader for engaging in a telephone interview on July 26, 2007. During the telephone interview, the claimed subject matter and the teachings in the cited reference were discussed. A considerable portion of the telephone interview was spent discussing the claim limitations, exemplified by independent claim 144, which states, "[A] wireless marker configured to be *implanted in* the patient relative to a target...." (Emphasis added) In this response, applicants wish to review the distinctions raised during the telephone interview between the claimed invention and the cited prior art reference.

Cosman discloses an optical system for positioning a portion of a patient's body for radiation treatment. Cosman's system relies on an optical camera observing reflected light from markers positioned on the body. The markers may include such devices as "...LED emitters, reflectors of light, reflecting spheres, reflecting dots or various other devices that can be tracked by the camera system...." (Cosman at column 4, lines 40-42). For the

system to work, the optical camera must have a direct line of sight to the optical markers. Thus, the markers described in Cosman must be positioned outside the body. Cosman does describe a marker capable of being anchored to the bone of a patient, but, as pictured in Figure 3C, only a "threaded distal tip 67" may be positioned beneath the surface of a patient's skin, while the marker portion, consisting of an "array of spaced-apart, reflecting spheres 66A, 66B, and 66C," is positioned outside the patient's body to achieve a direct line of site with the camera. (Cosman at column 9, lines 45-49).

Independent claim 144 contains the limitation of "a wireless marker configured to be implanted in the patient relative to a target...." As discussed in the telephone interview, Cosman does not anticipate this limitation as the Cosman system relies on optical markers with a direct line of site to the camera. If the Cosman markers are implanted in the patient, the direct line of site is obstructed, and the camera cannot observe the markers, thus rendering the system inoperable.

During the telephone interview, the Examiner did not have access to the definition of the word, "implanted." Accordingly, and as further discussed in the interview, applicants provide the following definitions:

implant – 2. to insert in living tissue (as for growth, slow release, or formation of an organic union)."

*Merriam-Webster's Online Dictionary*, <http://www.m-w.com/dictionary/implant> (2005).

implant - 1. To insert or embed an object or a device surgically. 2. To graft or insert a tissue within the body.

*The American Heritage Stedman's Medical Dictionary* (2nd ed. 2004).

implant – 4. to embed something such as a mechanical device in the body.

*Encarta World English Dictionary [North American Edition]*,  
[http://encarta.msn.com/dictionary\\_/implant.html](http://encarta.msn.com/dictionary_/implant.html) (2007).

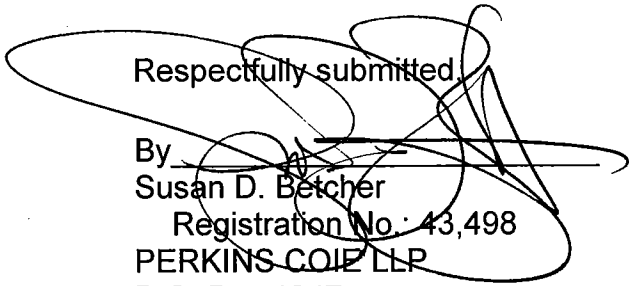
Applicants contend that each definition supports a reading of the claim which is not anticipated by Cosman. As such, having had the opportunity to review the definition of "implant," the applicants request that the Examiner reconsider his interpretation of Cosman.

For at least the above discussed reason, Cosman does not support a Section 102 rejection of independent claim 144-150.

In view of the foregoing, the pending claims, comply with 35 U.S.C. § 112 and are patentable over the prior art. Applicant respectfully requests reconsideration of the application and a mailing of a Notice of Allowance. If the Examiner has any questions or believes a telephone conference would expedite prosecution of this application, the Examiner is encouraged to call the undersigned at (206) 359-6088. The Commissioner is authorized to change any additional fees due by way of this Amendment, or credit any overpayment, to our Deposit Account No. 50-0665, under Order No. 341148004US3 from which the undersigned is authorized to draw.

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Respectfully submitted,

By   
Susan D. Betcher  
Registration No.: 43,498  
PERKINS COIE LLP  
P.O. Box 1247  
Seattle, Washington 98111-1247  
(206) 359-8000  
(206) 359-7198 (Fax)  
Attorney for Applicant